



# University of Hawaii at Manoa

**Environmental Center**  
Crawford 317 • 2550 Campus Road  
Honolulu, Hawaii 96822  
Telephone (808) 948-7361

Office of the Director

RL:0297

## Proposals 30, 45, 381, 658 and 685 RELATING TO A HEALTHFUL ENVIRONMENT

Statement for  
Con Con Committee on Environment, Agriculture,  
Conservation and Land  
Public Hearing 9 August 1978

by  
Williamson Chang, School of Law  
Jon Van Dyke, School of Law  
John Sorenson, Geography  
Ray Tabata, Sea Grant  
Doak C. Cox, Environmental Center  
Margaret Kimmerer, Environmental Center  
Peter J. Rappa, Environmental Center

Proposals 30, 45 381, 658, and 685 would amend Article X of the Constitution to add provisions related to a healthful environment. Because of their similarities, these proposals are addressed in a single statement, although none of the authors of this statement other than Cox have necessarily reviewed all five proposals. This statement does not reflect an institutional position of the University.

It will be helpful in comparing the several proposals to consider separately their provisions regarding environmental healthfulness environmental esthetics, natural resources, historic and cultural resources, population growth, and standing to sue concerning abridgement of rights in the above matters.

### Environmental healthfulness

Healthfulness of the environment may appropriately be considered a natural resource, and hence a matter covered by Article X of the present constitution which deals with the conservation and development of resources, as well as Article VIII which deals with public health. The major effects of one or more of the amendments proposed would be to establish the maintenance of a healthful environment as an explicit policy of the state and a duty of persons in the State, and to recognize healthfulness of the environment as a right enforceable through a broad standing to sue. The standing to sue provisions will be commented on separately. We will comment here on the proposed expressions of policy, duty, delegation of authority, and rights.

The most extensive provisions regarding healthfulness of the environment are in Proposal 30 which would establish under the Constitution the right of present and future generations to a healthful environment to clean air and water, to freedom from excessive and unnecessary noise and to natural, scenic, historic, and esthetic environmental qualities. The recognition of the needs of future generations as well as the present generation is appropriate. However, an objection that may be raised to the proposal is that it appears to regard healthfulness of the environment as a quality undefined but independent of and additional to the cleanliness of air and water, freedom for excessive noise, etc.

Proposals 45, 658, and 685 would establish a right to a healthful environment, without further definition except as in Proposal 685 the term used is a clean and healthful environment. Maintenance of a healthful environment is also expressed as a policy of the State in Proposal 45, which like Proposal 381 appropriately recognizes the needs of future generations and would express maintenance of environment a duty of persons.

In Proposal 381, maintenance of the healthfulness of the environment is first expressed appropriately as a duty of the State and of every person, but such healthfulness is then regarded as a right. This proposal also usefully recognizes, as examples of qualities important to healthfulness, the qualities separately listed in Proposal 30 and, in addition, some others. The examples listed include ionizing radiation, sustainable sources of food, preservation of natural, scenic, historic, and aesthetic qualities of the environment, and population levels consistent with these qualities.

Ionizing radiation, which probably refers to electromagnetic radiation, is wisely qualified as radiation at unnecessary and excessive levels.

What is intended by sustainable sources of food is not clear, but the language suggests that it would be the duty of every person as well as the State to assure that every person is provided with a continuing food supply, without regard to economic limitations.

The inclusion of scenic, historic, and esthetic qualities as elements of the healthfulness of the environment on the same level of importance as the others is questionable, although no doubt they may be considered to contribute to mental health. These and the element of population control will be addressed in later sections of the statement.

The expression of the duty to maintain other elements considered entering into environmental healthfulness as an individual duty as well as a duty of the State raises problems in Proposals 45 and 381.

No problem would be presented by expression in the Constitution of maintenance of a healthful environment as a policy of the State so long as the definition of a healthful environment were appropriate. No problem would be presented by expression of such maintenance as a duty of the State so long as, in addition, the elements of environmental healthfulness were realistically within the capacity of the State to maintain. The recognition that there are individual as well as governmental responsibilities would be appropriate, but individual duties, if mentioned, should be restricted to those which individuals can be expected realistically to provide. The expression of a right to a healthful environment is a basis for standing in the courts, a matter that will be separately addressed in this statement.

In summary, desirable features included in one or more of the proposals regarding healthfulness of the environment are the expression of: i) the right, ii) the

policy of the State; the duty of the State, the responsibilities of the State and of persons; and examples of qualities included in environmental healthfulness. None of the proposals contains all of these features without some less desirable or even objectionable features.

#### Environmental esthetics

Conservation of natural beauty is already a power of the State under Article VIII, Section 5, and natural beauty is properly regarded as a natural resource whose conservation is a duty of the legislature in Article X, Section 1. Esthetic qualities of the environment are addressed in Proposals 30, 381, 658 and 685.

In Proposal 658, Article VIII, Section 5 would be deleted, but in the proposed amendment of Article X, preservation of scenic and esthetic values of the environment is expressed as a right and as a duty of the legislature. Rights would be recognized under Article X to scenic and esthetic qualities in Proposal 30, and in Proposal 685 conservation of scenic beauty is expressed as a policy of the State and a duty of persons. In Proposal 381 natural scenic and aesthetic qualities of the environment are introduced as qualities included in the healthfulness of the environment. This is somewhat questionable although mental health may be influenced by esthetic qualities of the environment.

In the case of any recognition of environmental esthetics in the Constitution are much the same as features pertaining to healthfulness of the environment. In none of the proposals would all of the features be provided in Article X, but Article VIII, Section 1 would continue to provide the State's duty feature under those proposals that would not delete this section.

#### Natural resources

Article X, Section 1 now provides that the legislature shall promote the conservation, development, and utilization of agricultural resources, and fish, mineral, forest, water, land, game, and other natural resources. Since conservation is usually taken to mean the wise combination of preservation and use, the duty to promote the combination of conservation, development, and utilization of natural resources seems to emphasize undesirably the use, and even destructive use, end of the preservation-use spectrum. However, the development and use of natural resources is essential to human welfare, and the Constitution should provide for these as well as for their preservation. It should also continue to provide for the development of agricultural resources, which are not strictly speaking entirely natural.

Proposals 45 and 381 would retain Article X, Section 1 without change. Proposal 30 would retain the present content of Article X, Section 1, but would add to it matters that are sufficiently different to warrant inclusion as a separate section. Proposals 658 and 685 would replace Article X, Section 1.

In Proposal 658 the present article would be replaced by an article empowering the State to protect and conserve the natural resources, requiring the State to manage and regulate these resources. It thus stresses the preservation end of the preservation-use spectrum at the expense of the use end. Management of the resources is appropriate, but by regulation it probably refers to regulation of development of the resources.

Proposal 658 would also replace Article X, Section 2, which requires that the legislature vest in one or more executive boards or commissions, the powers for management of natural resources, by a new Section 2 requiring vesting in a single department or board. Broadening to include departments as well as boards and commissions is desirable, but the narrowing to a single department or board is unwise. Most of the regulatory powers regarding natural resource development are vested in the Board of Land and Natural

Resources. However, some powers use vested in other departments. For example, the Department of Health regulates pollution, and hence environmental quality.

In Proposal 685, Article X, Section 1, would be replaced by a section establishing as a policy of the state and the duty of each person the conservation, preservation, restoration and enhancement of the natural and agricultural resources of the State, and requiring the legislature to provide for implementation of this policy. The replacement would relate to agricultural as well as natural resources. In including enhancement as well as preservation, it may intend to balance preservation and development for use, although this is not clear. It is also not clear how individual persons can effectively respond to the expressed duty in all respects, for example, the duty to enhance agricultural resources.

Amendment of Article X, Section 1 seems appropriate to eliminate its present unbalance. However, none of the proposals appear to provide an amendment of the sort needed, and some would delete some of the desirable features of this article.

#### Historical and cultural resources

Under Article VIII, Section 5, the Constitution now provides power to the State to conserve and develop objects and places of historic or cultural interest. Proposal 658 would delete this section and replace it by provisions in Article X that the State has the power and duty to protect and maintain objects, events, and places of historic and cultural importance. The State should have the power to preserve historic objects and sites. Such preservation should also be a duty, but the duty should not extend to all historic objects and sites because many are not worth preserving. It is not clear how a historic event could be protected, preserved, or maintained.

Similar provisions would be made in Proposals 30, 381, and 685, none of which would delete Article VIII, Section 5.

In Proposal 30, a right would be established to historic qualities of the environment, and in Proposal 381 such qualities are included as aspects of the healthful environment, to which there would be a right. Preservation of objects and places of historic importance seems more appropriate than preservation of historic qualities of the environment. Indeed preservation of some historic qualities of the environment would be quite inappropriate. Further, it seems an exaggeration to consider historic preservation a necessary component of a healthful environment.

Among the five proposals, Proposal 685 would seem most appropriate in establishing the conservation of cultural resources as a policy of the State, though the word historic might usefully be added in this proposal.

#### Population

Proposal 381 would include the limitation of population as an essential component of the healthful environment which it would be the duty of the State and each person to maintain. Coupled with the right to a healthful environment and the standing to sue that would be established by the same proposal, this would appear to provide that one person might sue an immigrant, the mother of a newborn child, or the child, for the increase in population that would result from the migration or birth, if the population were considered already more than healthful. It would at least authorize suits against the State for failing to maintain its population at a level considered healthful.



Proposal 658 would establish as a power and duty of the State the regulation of its population and would require the legislature to vest the power for regulation of population growth in a department or board. Although this proposal also includes the statement of a right and a provision of standing to sue, these are restricted to the maintenance of a healthful environment, which is not defined on this proposal as including the maintenance of a certain population level.

Neither proposal would establish definite limiting populations or population densities.

The concepts of limits to growth and of carrying capacities have been much discussed lately and the subject of considerable research. That there are limits to growth and carrying capacities seems indisputable, but these limits are indefinite and subject to change. They would be extremely difficult to define even if subjective value judgements were involved, but they involve so many tradeoffs between material and non-material aspects of human welfare that they are essentially indefinite. Furthermore, with changes in technology and in the availability of resources external as well as internal to the State, they are subject to change.

Recognition that there are such indefinite and changeable limits may be appropriate. However, until there is a consensus as to some means of population control that will be in the net desirable and not in violation of the national constitution, it seems quite unwise to require the State to control population growth, particularly if this requirement is enforceable by individuals through a standing to sue.

#### Standing to sue

Each of the five proposals considered here would provide for standing to bring suit in the courts against individuals or the State for failure to protect the rights, or a part of the rights, that would be established in that proposal.

In Proposal 381, the standing would extend to all provisions of Article X, and the burden of proof would be placed on the agency or individual who takes an action to show that the action will not have deleterious effects on the environment or public health. It should be recognized that many actions, perhaps most, result in a combination of desirable and undesirable effects. The proper criterion for public approval of an action would seem to be that its net effect would be beneficial, not that it would be free from detrimental effects.

Objections to proposals to provide for enlargement of standings to sue have often been based on the assumption that they would result in a rash of suits. In the experience in other states that have adopted similar proposals, such rushes of suits have not developed. We note that provisions for the right to sue in environmental matters generally have been incorporated in the Constitutions of Illinois and New York and that similar provision related specifically to a healthful environment have recently been incorporated in the constitutions of Guam and the Virgin Islands.

Any enlargement of standing to sue should, however, be in respect of rights that are appropriately defined and, further, in respect of standards that have been duly adopted. Any constitutional enlargement of standing should be related to rights that can realistically be met and accompanied by an expression of the duty of the legislature to see that standards are set whereby the extent of the right is defined.

### Summary and conclusions

Each of the proposals here considered have some desirable features, but most would require revision. The most important of the desirable features are those that deal with the healthful environment, to which the expression of a right is surely appropriate. Expression of this right in the Bill of Rights has been proposed elsewhere, and should be considered as an alternative to its placement in Article X in accordance with these proposals.

Special care should be taken to assure that any duties imposed on persons can realistically and appropriately be placed on individuals and that any enlargement of the standing to sue should be anchored to rights that can realistically and appropriately be guaranteed and accompanied by the expression of a duty to see to the establishment of pertinent standards.

Care should be taken that desirable features now provided in Articles VIII and X are retained, whether or not sections of Article VIII are deleted in accordance with some of the proposals.

It should be recognized that other amendments of Article X and specifically Section 1 have been proposed, and the final placement of provisions contained in their proposals should be determined only when the Constitutional Convention agrees as to the substance of all of the amendments to that Article that it will recommend.